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No. 09-1381

JUL 13 2010

IN THE

Supreme Court of the United States

CAROLYN MITCHELL,

Petitioner,

v.

ANCHORAGE POLICE DEPARTMENT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the appellate court fail to recognize its own prior decision in *Washington v. Lambert*, 98 F.3d 1181 (9th Cir. 1996)? If so, did the appellate court err?

2. Has Petitioner presented any compelling reason to grant her Petition, where the appellate court's Memorandum affirming the District Court's post-verdict denial of judgment as a matter of law does not conflict with any decision of this Court or the appellate court, and where Petitioner does not claim that the appellate court's Memorandum implicates an important federal question that has not been settled by this Court?

INTRODUCTION

Petitioner has presented no "compelling reason" to grant her Petition for a Writ of *Certiorari*. Specifically, she has failed to demonstrate that the appellate court's Memorandum affirming the District Court's post-verdict denial of judgment as a matter of law is in conflict with a decision of this Court or another Court of Appeals. Nor has she demonstrated that the appellate court decided an important federal question that has not been settled by this Court. Therefore, the Petition should be denied.

STATEMENT OF THE CASE

All facts underlying the Petition are reflected in the verdicts of the jury, which determined Respondents did not violate Petitioner's Fourth Amendment rights. Specifically, in their Special Verdict on Fourth Amendment Claims, the jurors found: (1) Respondent officers had a reasonable suspicion Petitioner was the bank robber they were seeking, and (2) their detention of her did not become an arrest under federal law.[1]

The District Court's judgment was affirmed, App. 1-3; panel rehearing and rehearing *en banc* were denied, App. 9.

To the extent the Petition states a question for this Court, the only fact material for this Court's *certiorari*

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1. The Judgment on that verdict is at App. 6. The completed "Special Verdict Form, Fourth Amendment Claims" is Dkt. 139 in the trial court record.

decision is whether the appellate court "failed to recognize" its own decision in *Washington*. Question Presented, App. i.

The appellate court not only "recognized" its 1996 case, *Washington*, it expressly mentioned it, App. 2, as quoted in its 2002 decision in *Gallegos*. Leading up to the appellate court's decision, both *Washington* and *Gallegos* had been briefed and argued before the District Court as well as the appellate court. Both courts concluded *Gallegos* was factually on point and *Washington* was not. There is no basis for the proposition that the appellate court "failed to recognize" its older decision in *Washington*.

Even assuming the appellate court had "failed to recognize" its own older decision, no part of Sup. Ct. R.10 would commend such a "failure" to this Court's attention on *certiorari*.

MISSTATEMENTS OF FACT AND LAW

Some misstatements of fact and law in the Petition may bear on what issues properly would be before the Court if certiorari were granted, and are therefore addressed pursuant to Rule 15.3:

1. The Petition at Question Presented, page (i.), asserts that the appellate court failed to "recognize" its own decision in *Washington*, when, in fact, the Ninth Circuit expressly cited *Washington*, quoting it within its discussion of the Circuit's more recent, on-point decision in *Gallegos v. City of Los Angeles*, 408 F.3d 987, 991 (Ninth Cir. 2002). App. at 2.

2. The Petition at 2 asserts that an Alaska statute entitled "Bank Robbery" was applied against Petitioner. No such Alaska statute exists; no statute of any kind was applied against Petitioner, and no offense was charged. Moreover, the statute which Petitioner cites, Alaska Stat. 11.41.500, is actually entitled "Robbery in the first degree."

3. The Petition erroneously asserts as fact, Petition at 2, that police officers "drew firearms, pointing them at Ms. Mitchell . . ." The way the officers used their weapons was a disputed question at trial, one which the jury was not asked to resolve. On the related question whether the officers had violated Ms. Mitchell's Fourth Amendment rights, the jury found in the negative. Because the jury did not make a finding on how the officers used their weapons, Petitioner should not present her version as a fact of record in this case.

REASONS FOR DENYING THE PETITION

The Petition presents no conflict among the circuits, no compelling reason for review, nor even an important and unsettled legal issue.

A. The Petition presents no conflict among the circuits. Notwithstanding its assertion to the contrary, the Petition presents no conflict among the circuits. At 3, Petitioner's heading refers to "THE SPLIT IN THE CIRCUIT" (*sic*), and is followed immediately by this sentence: "In *Washington v. Lambert* . . . was held in conflict with this Court's decision of *Virginia v. Moore* . . ." (*sic*).

A "SPLIT IN THE CIRCUIT," assuming one existed, need not reach the attention of this Court. It would be a matter for the circuit to resolve. For purposes of *certiorari* decisions, a "split" or conflict *within* a circuit is of no concern. Thus, Sup. Ct. R. 10(a) does not supply a basis for this Court's discretionary review.

As for the incoherent sentence that followed the heading, Respondents cannot identify what "conflict" Petitioner means to assert. If, *arguendo*, she perceives a "conflict" between a 1996 decision by the appellate court, and a 2008 decision by this Court, that "conflict" ended before it began. Such a "conflict" would not even merit this Court's consideration in deciding whether to grant review. That is, assuming *arguendo* that *Washington* and *Virginia v. Moore* were in conflict, issuance of the latter would have trumped the former.

B. The Petition articulates no important and unsettled question of federal law. The Petition does not attempt to assert that the appellate court "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." No such federal question is stated. Thus, Sup. Ct. R. 10(c) does not supply a reason for this Court's discretionary review.

C. The Petition offers no "compelling reasons" for this Court's review. Nothing in the Petition provides "compelling reasons" for this Court to review the appellate court's Memorandum, which affirmed the District Court's judgment, based on the jury's findings, following a full trial

on the merits.[2] Thus, Sup. Ct. R. 10 does not supply grounds on which the Court should exercise its discretion and review the appellate court's ruling.

CONCLUSION

Petitioner has established no compelling reasons for this Court to grant her Petition. Therefore, Respondents respectfully request the Petition be denied.

Respectfully submitted,

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2. The Memorandum, in turn, was followed by denial of panel rehearing and rehearing *en banc*. App. 9.